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No. 862

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

UNITED STATES OF AMERICA, *Petitioner*,

v.

MOORE-McCORMACK LINES, INC., AND INDEMNITY INSURANCE COMPANY OF NORTH AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW AND JURISDICTION

The opinions below and jurisdictional requisites are cited and set forth in the petition.

QUESTION PRESENTED

Whether section 709(a) of the Merchant Marine Act, 1936, which provides for payment to the United States of 50 percent of "cumulative net voyage profits" derived from the operation of government-chartered vessels, requires cumulation (offsetting) of annual profits and losses over the entire period of the charter

in determining the amount of profits to be shared with the Government.

The court of appeals held that such cumulation is required by statute. The Government urges that cumulation is required when a profit year follows a loss year, but is prohibited when a loss year follows a profit year.

STATUTE INVOLVED

Section 709(a) of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1199(a)), provides:

> Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided*, That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

COUNTERSTATEMENT OF THE CASE

From 1951 through 1957, Moore-McCormack Lines, Inc., bareboat-chartered three passenger vessels from the Maritime Administration, and operated them in the trade between New York and South America. The charter provided that the company would pay a fixed monthly charter hire of $22,000 for each vessel (called "basic charter hire"), and also that it would pay

"additional charter hire," as described in section 709(a), *supra*, equal to one-half of the "*cumulative* net voyage profit in excess of 10 per centum per annum"[1] realized from the operation of the vessels.

Subsidy has been paid by Maritime to the company since 1938 to support these operations under a series of operating-differential subsidy agreements pursuant to title VI of the Merchant Marine Act, 1936 (46 U.S.C. 1171-1182). The applicable agreement was amended in 1951 to provide that subsidy would be continued to December 31, 1957, on condition that the company maintain sailings with the chartered vessels and build new vessels to replace them at the termination of the charter. The maintenance of this service was deemed essential by Maritime to the interests and prestige of the United States, and the charter could not be terminated except with the consent of the Government (Moore. A25-A27).[2]

During 1951 and 1952, the operation of the vessels, before payment of subsidy, resulted in losses to the company of $1,171,883 and $4,298,245, respectively (Moore. A33). After computation of subsidy for these years, however, the operation showed "net voyage profits," one-half of which amounted to $592,088. The latter amount would have been payable to Maritime under section 709(a) if the charter had terminated at the end of 1952. However, during the years 1953

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[1] Emphasis added in quotations unless otherwise indicated.

[2] The Government has filed in this Court the appendices printed for the use of the court of appeals. References herein to Moore-McCormack's appendices A and B (white volume) are designated "(Moore. A1, B1 etc.)," following the pagination employed therein.

through 1957, the vessels sustained losses (after subsidy) of $6,000,000 (Moore. A23). Since these losses far exceeded the 1951-1952 profits, the company contended that there were no "cumulative" profits to be shared with the Government under section 709(a).

The district court held (accepting the argument which the Government has now repudiated in its petition) that the phrase "cumulative net voyage profits" required the cumulation only of profits and losses of individual voyages terminated during each calendar year, and did not permit any cumulation of profits and losses from year to year.

The court of appeals reversed and held that section 709(a) required the cumulation of annual profits and losses over the period of the charter. Since the large 1953-1957 losses more than offset the 1951-1952 profits, it held that no "additional charter hire" was due.

ARGUMENT

It is respectfully submitted that review by this Court is unwarranted. No conflict exists, and the opinion of the court below is well reasoned and exhaustively analyzes every theory of statutory construction advanced by the Government. That opinion has construed section 709(a) in a manner which harmonizes all of its parts, gives effect to the purpose of the statute and the intent of Congress, and avoids the absurd result flowing from the latest statutory construction urged by the Government. There is no recognized consistent administrative construction or practice in conflict with the opinion of the court of appeals, and the scope and importance of the issue has been greatly exaggerated.

1. The Decision Below Is Correct and Leaves Nothing to be Added By This Court

Three possible constructions of section 709(a) have been advanced: (i) that profits and losses for the several years comprising the life of the charter should be cumulated or combined in reaching the amount of profit to be divided with the Government (the position of the court below); (ii) that each year's results be treated separately, with no cumulation or offsetting (the position originally taken by the Government but rejected by the court of appeals, and now confessed to be erroneous in the petition for certiorari); and (iii) the lastest construction advanced by the Government, that losses may be offset by profits where the loss year precedes the profit year but may not be offset where the profit year precedes the loss year. The third construction, which was urged by neither party, the court nevertheless considered and found "capricious" because, among other reasons, it would "require additional charter hire of $50,000 of a charterer who has excess profits of $100,000 in one year and a loss of a like, or even a much larger, amount in the succeeding year, when no additional hire would be due if it lost $100,000 the first year and had excess profits in a like amount in the second year" (Pet. 29-30).

The court below correctly pointed out that cumulation or offsetting of losses against profits, regardless of which precedes the other, (a) gives effect to the word "cumulative," which appears four times in section 709(a) (Pet. 23); (b) harmonizes that section with the parallel subsidy "recapture" provisions of the act (sections 606(5) and 607) which provide for the repayment to the Government of operating differential subsidy in amounts equal to one-half of profits in excess

of 10 percent per annum (Pet. 25); (c) carries out the intent of Congress to allow vessel operators to accumulate reserves in profit years to offset losses in an industry of a highly cyclical nature (Pet. 17, 27); (d) avoids the absurdity that charterers incurring the same profits and losses pay different amounts of additional charter hire depending upon whether the losses precede or follow the profits (Pet. 29-30); and (e) gives vitality and meaning to the proviso at the end of section 709(a) (Pet. 24, 29).

The Government focuses on the words in the statute "whenever, at the end of any calendar year," and argues that these words create an irrevocable obligation to pay additional charter hire at the end of any year in which the cumulative results up to that date show a profit. If a loss year then occurs, the Government contends that a new cumulation cycle commences. These contentions add a concept of irrevocability to the statute which is not present in its language, and read the word cumulative out of the statute where, as here, loss years follow profit years.

The "calendar year" language on which the government relies was designed merely to establish uniform calendar year accounting procedures for charter and subsidy contracts (Moore. B1-B20). Additional charter hire is computed with reference to a percentage of profits "per annum" and annual accountings are necessary to determine profit and loss, and capital necessarily employed upon which the 10 percent annual return is computed. Only after these computations are made are the final annual results known from which can be determined the extent and effect of cumulation.

Clause 6(a) of the Moore-McCormack charter (Pet. 20, ftn.) confirms this interpretation and is consistent with the opinion of the court of appeals. It requires a payment of additional charter hire only "*if* at the end of the calendar year 1951, *or* any subsequent year *or* at the termination of this Agreement, the cumulative net profit . . ." shall exceed 10 percent per annum. This language, specifying alternative dates, clearly suggests reappraisal of the year-to-year results at the end of each accounting period, and at the termination of the charter. There is no suggestion in this clause that the scope of cumulation is limited or cut off at the end of a profit year, if later losses occur.

The contention of the Government that payments are "absolutely final" (Pet. p. 8) is further refuted by clause 6(b) of the charter (Pet. p. 20, ftn.), which provides for "preliminary payments" on account of profit sharing hire "at such times and in such manner and amounts as may be required by the Owner [Maritime]; . . ." These payments are stated to be subject to adjustment and refund "to the Charterer as may be required." This language makes it clear that the accounts of the parties were to be kept open for mutual adjustment as required for items of revenue and expense recorded after the end of the year in question, for final subsidy determinations customarily not completed for several years (Moore. A33-A35), and for comparison of profit and loss results during the respective years of the charter. The statute does not make the payments final or irrevocable; the charter expressly states that they are not.

As for the proviso at the end of section 709(a), the court below was correct in holding that it was designed to prevent any suggestion that profits may be pyra-

mided on later profits, thus duplicating payments with respect to the same profits. For example, if a charterer earned $100,000 during each of two consecutive years, the proviso prevents a computation under which the $50,000 of profits retained by the charterer for the first year would be added to the $100,000 of profits the second year, and then be divided again with the Government. The proviso refers only to the carrying forward of profits into a *profit* year, and does not refer to the carrying forward of a profit into a *loss* year. If the Government's construction of the "end of any calendar year" language were correct, the proviso would be superfluous.

2. There Is No Consistent Administrative Practice in Conflict With the Decision Below

The position of the Government in the courts below was that the administrative practice was wrong and entitled to no weight whatever. It now suggests that a conflict between the court of appeals decision and what the Government now alleges was a valid administrative construction is a ground for review by this Court.

In fact there has been no applicable administrative construction on the question in issue. Furthermore the rationale for the alleged practice of Maritime to disallow cumulation where losses followed profits has never been revealed, its scope is undefined, it was promptly contested, and has been the subject of litigation ever since.

The sole evidence of administrative construction consists of (i) a 1941 unpublished interoffice memorandum of one of Maritime's assistant general counsel (Moore. A37-38), and (ii) a regulation adopted in

1950 to apply to charters made under the Merchant Ship Sales Act of 1946.[3]

[3] The regulation (46 C.F.R. 299.49) provides:

Calculation of net voyage profit on cumulative basis. In providing for the calculation of additional charter hire based on the cumulative net voyage profit of the Charterer, Clause 13 of Part II of SHIPSALESDEMISE 303 provides also that such cumulative net profit so accounted for shall not be included in the calculation of cumulative net profit in any subsequent year or period. Pursuant to these provisions of the bareboat charter agreements, only deficiencies in net voyage profits may be carried forward, and then only under the following conditions:

(a) In any instance where a net voyage loss is sustained as a result of operations under SHIPSALESDEMISE 303 during any accounting period terminating at the end of a calendar year and a net voyage profit is realized thereunder in the next succeeding accounting period, the net voyage loss and the net voyage profit for the respective periods may be combined and additional charter hire may be computed on the basis of the net result using the number of days consumed on terminal [sic] voyages during the combined period (together with the number of days during which any of the chartered vessels were inactive during that period) in determining the applicable percentages in accordance with the table set forth in Clause 13 of Part II of the said form of charter.

(b) In any instance where the net voyage profit realized as a result of operations under SHIPSALESDEMISE 303 during any accounting period terminating at the end of a calendar year is less than 10 percent per annum of "capital necessarily employed" during that period and the net voyage profit realized thereunder in the next succeeding accounting period is in excess of 10 per cent per annum of "capital necessarily employed" during such succeeding period, the net voyage profits for the respective periods may be combined and additional charter hire may be computed on the basis of the combined result, using the number of days consumed on terminated voyages during the combined period (together with the number of days during which any of the chartered vessels were inactive during that period) in determining the

The unpublished interoffice memorandum did not even discuss the question of whether losses may be carried back against earlier profits; the memorandum considered only whether losses could be carried forward to offset later profits, which it agreed was proper. It also said that the proviso at the end of section 709(a) was intended, as the court below found, to prevent the pyramiding of profits from year to year (Pet. 24, 29).[4]

The 1950 regulation relied upon to support the administrative practice applies only to charters under the Merchant Ship Sales Act of 1946. The charter here was entered into under the Merchant Marine Act, 1936. The regulation refers to clause 13 of the Ship Sales Act form of charter, which contained a sliding scale of profit-sharing percentages in excess of the 50 percent specified in section 709(a), and prescribes the method of adjusting charterers' accountings under the sliding scale clause to take into account "the number of days consumed on terminated voyages" during consecutive years. The regulation is not directed to the question whether losses may be carried back against earlier profits; it is directed to the situation where a profit year follows a loss or deficiency year.

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applicable percentages in accordance with the table set forth in Clause 13 of Part II of the said form of charter.

Provided, however, That in any such instance involving any addendum to SHIPSALESDEMISE 303 whereunder additional charter hire is required to be computed, accounted for, and paid separately, the net voyage profits and net voyage losses thereunder likewise shall be treated separately for these purposes and shall not be combined with those under SHIPSALESDEMISE 303 or any other addendum thereto.

[4] The importance attached by the Government to this memorandum may be judged from the fact that it was produced at the hearing in the district court only on demand of counsel for Moore-McCormack.

Moreover, the agency's attempt to apply the regulation to prevent loss carry-back immediately led to litigation. The regulation has been in effect for thirteen years, and in litigation for ten of these.[5] The Department of Justice has attempted to upset the regulation even on the point which it clearly covers, namely, the carry-forward of losses against later profits, and has heretofore instituted suits to recover charter hire from some of the charterers on the theory that loss carry-forward should not have been allowed.

Maritime's rationale for its refusal to permit the carry-back of losses, therefore, remains a mystery. The administrative practice must be clear, unambiguous, and uncontested to receive weight in construing a statute. *Sanford's Estate* v. *Commissioner of Internal Revenue*, 308 U.S. 39, 48 (1939); *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1, 16 (1932).

3. The Issue Is of Limited Importance

The petition implies that the issue in this case is of controlling importance in thirty-five pending cases (Pet. 53-54) and suggests that many millions of dollars are involved. All of these cases are stated in the petition to involve 1946 Act charters; none, a 1936 Act charter such as that involved here. Also, the issue is but one of several in the litigation and the figures are grossly exaggerated.

We have, so far as possible, checked the accounting figures in the cases listed by the Government. Of the thirty-five cases, five duplicate other cases on the same list, being either cross-libels of the Government on the

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[5] See list of cases in *American-Foreign Steamship Corp.* v. *United States*, 265 F. 2d 131, 143 (2d Cir. 1958).

same contracts or actions for declaratory judgment raising issues on the same contracts.

In thirteen of the remaining thirty cases, the total amount directly involved in the cumulation question is about $790,000, of which two-thirds relates to subsidized operators whose net claims would be further reduced approximately one-half by subsidy recapture adjustments (Pet. 22). In thirteen others, the issue either does not exist, or becomes material only if other accounting disputes are decided against the Government.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 5, 1963